

2007 WL 4329031 (Ariz.App. Div. 1) (Appellate Brief)
Court of Appeals of Arizona, Division 1.

In the Matter of the Estate of Victor B. FRIEDMAN, deceased,
and
In the Matter of the Friedman Family Trust dated July 28, 1977, as amended;
Dennis Friedman and Libby Friedman, Petitioners/Appellants,
v.
Jo Ann Friedman Burgess, as Trustee of the Friedman Family Trust
and as nominated personal representative, Respondent/Appellee.

No. 1 CA-CV07-0507.
November 13, 2007.

Maricopa County Superior Court No. PB2003-003523

Appellee's Answering Brief

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***i TABLE OF CONTENTS**

INTRODUCTION	1
STATEMENT OF THE CASE	2
A. The Trust Documents	2
B. The Guardianship Proceedings	3
C. The Present Probate Case	5
STATEMENT OF FACTS	11
A. Dennis	12
B. Victor - Before June, 1997	13
D. Evidence Relating to Victor's Testamentary Capacity	14
1. No Changes to the Original Trust Agreement from 1993 to 1997	14
2. Encephalitis, June, 1997	14
3. Changes to Original Trust Agreement After the Brain Injury	15
4. Dr. Pamela Willson, Clinical Neuropsychologist	17
5. Dr. John Michael Powers, Neurologist	19
6. Dr. Manuel H. Tafur, Psychiatrist	20
7. Jo Ann Friedman Burgess, Victor's Daughter	22
ISSUES PRESENTED FOR REVIEW	22
ARGUMENT	23
I. STANDARD OF REVIEW	23
II. THE TRIAL COURT PROPERLY EXERCISED ITS DISCRETION IN REFUSING TO APPLY THE DOCTRINE OF JUDICIAL ESTOPPEL	24
A. Jo Ann Never Took a Contrary Position on the Same Question - Whether Victor had Testamentary Capacity to Execute the Amendments	25
*ii B. Jo Ann was Never "Successful" on the Same Issue - That is, the Trial Court Never Previously Determined Whether Victor had Testamentary Capacity to Execute the Amendments	30
C. In any Event, the Trial Court Properly Exercised its Discretion in Refusing to Apply the Doctrine of Judicial Estoppel	32

III. THE STATUTE OF LIMITATIONS ARGUMENT IS INAPPLICABLE	32
IV. THE TRIAL COURT PROPERLY EXERCISED ITS DISCRETION WITH RESPECT TO THE DOCTRINE OF LACHES	35
V. THE TRIAL COURT'S FINDING OF LACK OF TESTAMENTARY CAPACITY IS SUPPORTED BY THE EVIDENCE	37
VI. LEGAL FEES	42
CONCLUSION	42

*iii TABLE OF AUTHORITIES

Cases

<i>Bank of America Nat. Trust and Sav. Ass'n v. Maricopa County</i> , 196 Ariz. 173, 993 P.2d 1137 (App. 1999)	25, 30
<i>Evans v. Liston</i> , 116 Ariz. 218, 568 P.2d 1116 (App. 1977) ..	38
<i>Flying Diamond Airpark, LLC v. Meienberg</i> , 156 P.3d 1149 (App. 2007)	23
<i>Gust, Rosenfeld & Henderson v. Prudential Ins. Co. of Am.</i> , 182 Ariz. 586, 898 P.2d 964 (1995)	32
<i>In re Thomas' Estate</i> , 105 Ariz. 186, 461 P.2d 484 (1969)	23, 39, 42
<i>In re Weil's Estate</i> , 21 Ariz.App. 278, 518 P.2d 995 (App. 1974)	36
<i>Matter of Estate of Brown</i> , 137 Ariz. 309, 670 P.2d 414 (App.1983)	42
<i>Matter of Estate of Killen</i> , 188 Ariz. 562, 937 P.2d 1368 (App. 1996)	10, 29, 30, 31, 36, 38
<i>Matter of Estate of Thorpe</i> , 152 Ariz. 341, 732 P.2d 571 (App.1986)	37
<i>Olivas v. Board of Nat. Missions of Presbyterian Church, U. S. of America</i> , 1 Ariz.App. 543, 405 P.2d 481 (App. 1965) ..	33
<i>Premium Cigars Intern., Ltd. v. Farmer-Butler-Leavitt Ins. Agency</i> , 208 Ariz. 557, 96 P.3d 555 (App. 2004)	24, 33
<i>Sotomayor v. Burns</i> , 199 Ariz. 81, 13 P.3d 1198 (2000)	35
<i>State ex rel. Baumert v. Superior Court for Maricopa County</i> , 118 Ariz. 259, 576 P.2d 118 (1978)	28
<i>State v. Brown</i> , 212 Ariz. 225, 129 P.3d 947 (2006)	23
<i>State v. Towery</i> , 186 Ariz. 168, 920 P.2d 290 (1996)	24

*iv Statutes

A.R.S. §12-2101(B)	11
A.R.S. §12-550	32
A.R.S. §14-1102	42
A.R.S. §14-1103	42
A.R.S. §14-5101(1)	4
A.R.S. §14-7201(A)	33, 35
A.R.S. §46-455(H)	42
A.R.S. §46-455(0)	42
A.R.S. §46-456	2, 6, 31

Other Authorities

Restatement (Second) of Trusts, §259 (1959)	33
Rules	
Arizona Rules of Civil Appellate Procedure, Rule 21	42
Arizona Rules of Civil Procedure, Rule 36(c)	28

*1 INTRODUCTION

This appeal arises out of the determination that a decedent lacked testamentary capacity when he executed two amendments to his trust after suffering significant brain injury. Following a three day trial, with testimony from three medical doctors who treated him, and no contrary medical evidence, the Trial Court found that Victor Friedman lacked at least one of the required elements of testamentary capacity at the time he signed the amendments.

The probate matter arose out of the estate of Victor Friedman (“Victor”), who died in March, 2003, at the age of 91. Victor's wife Evelyn Friedman (“Evelyn”) died in 1995. Victor and Evelyn's 1993 trust agreement left the bulk of their substantial estate to their daughter, Respondent/Appellee Jo Ann Friedman Burgess (“Jo Ann”), and made limited provisions for their son, Petitioner/Appellant Dennis Friedman (“Dennis”), and for Victor's sister, Petitioner/Appellant Libby Friedman (“Libby”).

In June, 1997, Victor contracted viral encephalitis and lapsed into a coma. He emerged from the coma with measurable and irreparable damage to his brain. Although he was able to communicate and often appeared lucid to laypersons, medical tests revealed that he had no short term memory.

After his illness and brain injury, Victor executed two trust amendments, the combined effect of which was to provide a substantial bequest to Dennis and to double Libby's bequest. The validity of those amendments is the subject of this *2 appeal. Dennis and Libby raise issues questioning not only the evidence to support the Trial Court's finding of lack of testamentary capacity, but also issues of purported estoppel, laches and statute of limitations with respect to the question of capacity. The record is clear, however, that Victor's mental capacity has always been an issue from the time of Victor's illness and subsequent execution of the trust amendments. The record shows that the issue of Victor's capacity has been raised repeatedly by Jo Ann, and, most strenuously, by Dennis and Libby themselves.

Dennis and Libby commenced this action, asserting claims against Jo Ann, individually and as Trustee of the Friedman Family Trust (the “Trust”) for, *inter alia*, formal probate of Victor's will, determination of estate property, an accounting, breach of fiduciary duty, distribution of certain bequests, and financial exploitation of a vulnerable adult pursuant to [A.R.S. §46-456](#). With respect to all allegations of wrongdoing, the Trial Court found in favor of Jo Ann and against Dennis and Libby. This is Dennis and Libby's second appeal.

STATEMENT OF THE CASE

A. The Trust Documents

Evelyn and Victor created the Friedman Family Trust by Trust Agreement dated July 28, 1977, and amended by Second and Complete Amendment to Trust Agreement dated November 4, 1993 (collectively, the “Original Trust *3 Agreement”). (Trial Exhibit (“T.E.”) 1). The Original Trust Agreement provides for (1) distribution to Victor and Evelyn during their lifetime; (2) benefits to the survivor of the two at the death of one of them; (3) \$50,000.00 to Dennis at the death of Evelyn, with a contingent inheritance to Dennis in the event Jo Ann died before the age of 55¹; (4) \$100,000.00 to Libby; and (5) the remainder of trust assets to Jo Ann. (*Id.*; see also April 9, 2007 Transcript (“4/9/07 Tr.”), p. 135).²

After Evelyn's death in 1995 and after his 1997 illness, Victor executed an Amendment to Trust Agreement dated May 22, 1998 (the “1998 Amendment”) and a Second Amendment to Trust Agreement Concerning the Survivor's Trust dated April 4, 2001 (the “2001 Amendment”). (T.E. 3, 5). The 1998 Amendment created a Charitable Remainder Unitrust (“CRUT”) for which Dennis is the named income beneficiary, but also had the effect of eliminating any bequest to Libby. (T.E. 3). The 2001 Amendment provided again for the CRUT and added a \$200,000.00 bequest to Libby (“Libby's Bequest”). (*Id.*).

B. The Guardianship Proceedings

On May 30, 2001, Dennis and Libby filed a Verified Petition for Emergency Appointment of Guardian, Conservator, and Successor Trustee (PB 2001-002282) (the “Guardianship Proceedings”). (T.E. 7). Dennis and Libby alleged Victor was *4 “incapacitated as defined by [A.R.S. §14-5101\(1\)](#) because [Victor] is impaired by reason of mental deficiency, mental disorder, physical illness, disability and vulnerability to exploitation to the extent that he lacks sufficient

understanding or capacity to make or communicate responsible decisions concerning his person.” (*Id.*, p. 5). They explained Victor's incapacity as follows:

Victor Friedman was a successful, capable man until he contracted viral encephalitis, the symptoms of which manifested themselves on Father's Day, June 14, 1997. He became very ill and was hospitalized, subsequently in a coma at St. Joseph's Hospital. He was then transferred to St. Luke's Skilled Nursing Center and later transferred to St. Luke's Rehabilitation Center and ultimately back to his home. As the result of his illness, the frontal lobe of his brain received severe damage resulting in significant cognitive impairments. Victor was, for all practical purposes, an incapacitated adult since June 14, 1997.

(*Id.*, p. 2). Although Victor filed an Objection to the Guardianship Proceedings (T.E. 9), by not later than November 14, 2001, all parties, including Jo Ann, ultimately agreed that Victor was in need of a guardian. On November 14, 2001, the Honorable Barbara Mundell entered a stipulated order finding by clear and convincing evidence that Victor was in need of a guardian, and appointed Jo Ann as the guardian. (T.E. 19). The stipulated order is signed by counsel for Victor, Libby and Dennis, and Jo Ann. (*Id.*, pp. 2, 3).

***5 C. The Present Probate Case**

Victor died in March, 2003 and, in August, 2003, Dennis and Libby filed the Petition for Formal Probate and for Determination of Estate Property and Petition for Removal of Trustee, for Immediate Funding of Charitable Remainder Unitrust and Disbursement to Libby Friedman, for Declaration of Terms and Assets of Irrevocable Trust and for Accounting. (CR 1). In April, 2004, Dennis and Libby filed an Amended Petition to add an “exploitation” claim against Jo Ann, alleging that “[a]t all times relevant [since June, 1997], Victor B. Friedman was an incapacitated and vulnerable adult.” (CR 51). At a hearing on June 10, 2004, the Trial Court appointed Special Administrator Marlene Appel to investigate and determine the viability of the “exploitation” claim. (CR 62).

In June, 2004, based upon Dennis and Libby's broad allegations of incapacity, Jo Ann, as Trustee, filed a Petition for Instructions Re Validity of 1998 Amendment and 2001 Amendment to the Friedman Family Trust (“Petition for Instructions”). (CR 67). The Petition for Instructions noted that pleadings filed by Dennis and Libby “call into question the validity of the 1998 and 2001 Amendments, either directly or indirectly.” The Petition for Instructions refers to the prior Guardianship Proceedings, to Dennis and Libby's assertions that Victor “attempted” to amend the Survivor's Trust, and to Dennis and Libby's reference to Victor's “alleged testamentary intent.” (*Id.*, p. 2, emphasis added). The Petition *6 for Instructions further notes that, in Requests for Admission, Dennis and Libby asked Jo Ann to acknowledge that Victor was an incapacitated and/or vulnerable adult. The Petition for Instructions states that Dennis and Libby put the validity of the 1998 and 2001 Amendments at issue; that, as a fiduciary, the Trustee is obligated to ensure that the Trust is administered properly; and that as Trustee, “Jo Ann does not take a position as to Victor's capacity to execute the 1998 and 2001 Amendments.” (*Id.*, p. 3).

Objecting to the Petition for Instructions at a status conference on August 2, 2004, Dennis and Libby denied that their allegations of incapacity went to Victor's testamentary capacity or the validity of the Amendments. The Trial Court rejected Dennis and Libby's effort to cull the Amendments that benefitted them from the reach of their multiple incapacity allegations and held that the matter “will be best resolved following presentation of evidence at trial, if trial is warranted according to the conclusions/recommendations of the Special Administrator's ongoing investigation.” (CR 68).

Following a thorough investigation, Appel submitted a detailed, 81 page report. (CR 94). Appel noted that the sole purpose of her investigation was to determine whether evidence existed to pursue an [A.R.S. §46-456](#)³ “exploitation” *7 action against Jo Ann (*Id.*) Appel further noted that she was not appointed to “second-guess” Jo Ann regarding administration of trust assets and that the investigation was not intended to be a “fishing expedition.” (*Id.*, p. 2). Appel reported that Victor was a “vulnerable adult at all relevant times” (*Id.*, p. 78), but concluded that there was no basis for an exploitation claim against Jo Ann. (*Id.*, p. 2). The Special Administrator acknowledged that, for purposes of her investigation, the parties had stipulated to the validity of the Amendments, but expressly noted that Jo Ann had filed the Petition for Instructions and that the Court stated that it would

resolve the Petition after the filing of Appel's report. Appel further expressly noted that "the issue raised in the Petition is not relevant to my findings." (*Id.*, p. 25, fn 1).

In October, 2005, still battling to eliminate the Petition for Instructions and protect the Amendments, Dennis and Libby filed a Motion for Summary Judgment regarding Victor's Testamentary Capacity. (CR 104). Jo Ann, individually and as Trustee, opposed the Motion, expressly noting that the Court had previously determined that the validity of the Amendments "is an issue of fact to be decided at trial." (CR 105, p. 1). Jo Ann detailed the inconsistent nature of Dennis and *8 Libby's positions regarding Victor's incapacity, and maintained her position that the validity of the documents was an issue to be resolved at a trial. (CR 105).

The Court denied Dennis and Libby's Motion for Summary Judgment finding that:

Both parties agree that there will be no evidence of Victor Friedman's incapacity to execute the Second Amendment to the Survivor's Trust dated April 2, 2001. However, regarding the presentation of incapacity at all other times, before and after the time of execution on April 2, 2001, there is no agreement reached. This leaves open the possibility that even though no evidence of incapacity at the time of execution on April 2, 2001 will be presented, the Court, based upon other evidence of incapacity, could possibly find Victor Friedman did not have testamentary capacity when he executed the Second Amendment to Survivor's Trust.

(CR 115).

By November, 2005, through summary judgment or otherwise, the Trial Court had dismissed most of Dennis and Libby's claims and ordered that Dennis and Libby were responsible for the Special Administrator's fees and costs. To the extent that there was further evidence on the issue of breach of fiduciary duty, the Court set the matter for trial. (CR 121). At a status conference in December, 2005, after Dennis and Libby had lost all of their claims against Jo Ann, they advised the Court that they would not proceed with their breach of duty claims. This left only the Petition for Instructions at issue. To induce Jo Ann to dismiss the Petition for Instructions, Dennis and Libby withdrew all allegations of Victor's *9 incapacity set forth in any of their pleadings. In reliance thereon, Jo Ann agreed to dismiss the Petition for Instructions, but only "without prejudice" to allow for further inquiry as to Victor's capacity or the validity of the Amendments. (CR 122; see also CR 158, p. 5, lines 8 - 12). The minute entry shows that a record of the proceedings was made by audio or videotape in lieu of a court reporter, but Appellants have not provided the transcript for this appeal. The only evidence available to this Court shows that Dennis and Libby argued that the Petition for Instructions be dismissed with prejudice, but that the Trial Court agreed to dismissal without prejudice, to permit future adjudication of "the fundamental issue of the validity of the 1998 and 2001 Trust Amendments." (CR 183, p. 5, line 18 -p. 6, line 3).

Final Judgment on the Amended Petition was signed August 31, 2006 and entered September 5, 2006. (CR 158).⁴ Less than a week later, on September 11, 2006, Dennis filed his Petition for Partial Distribution and for Determination of the Validity of the Friedman Family Trust Agreement and its Amendments. (CR 161). Jo Ann, individually and as Trustee, objected and requested an evidentiary hearing. (CR 170, 173). Specifically, Jo Ann pointed out that there was evidence from *10 which the court could conclude the Amendments were invalid because at the time Victor executed them, he either (1) lacked testamentary capacity or (2) was subject to influence by Jo Ann and Victor's lawyer Leslie Plattner. (CR 170, pp. 1-2).

After an evidentiary hearing on April 9, 10 and 11, 2007, the Trial Court took the matter under advisement and considered the evidence presented and arguments of counsel. (CR 199). Citing *Matter of Estate of Killen*, 188 Ariz. 562, 937 P.2d 1368 (App. 1996), the Trial Court identified testamentary capacity as the ability to (1) know the nature and extent of the person's property, (2) know the relations of the persons who are natural objects of the testator's bounty and whose interests are affected

by the terms of the documents in question, and (3) understand the nature of the testamentary act. To invalidate the Amendments, the Trial Court said that the evidence must show by a preponderance standard that Victor lacked at least one of the foregoing elements at the time he signed the Amendments. (*Id.*).

The Trial Court found that the evidence clearly established the following: Victor had testamentary capacity when he executed the Original Trust Agreement. In mid-June, 1997, Victor contracted herpes simplex encephalitis, and was comatose for several weeks. An MRI in late June, 1997 showed that the disease structurally destroyed Victor's brain tissue. Although he regained consciousness, the damage to his brain and short-term memory was permanent. He forgot what was told to him in a matter of moments. Despite the brain damage, his long term *11 emotional memory was intact, allowing him to present well and give the impression that he was processing information. This allowed those around him to believe that he had the ability to understand and process new information, when in fact he had lost that ability. The Court thus concluded the following:

After June 1997, the best-case scenario in describing Victor Friedman's brain capacity is that he was able to understand one of the required elements for testamentary capacity momentarily. However, he could not retain the information needed to comprehend all of the elements at the same time to properly execute the amendments.

(*Id.*) The Trial Court accordingly ordered that the 1998 Amendment and the 2001 Amendments are invalidated. (CR 199, 203).

Dennis and Libby timely filed a Notice of Appeal on June 15, 2007. (CR 206).

This Court has jurisdiction pursuant to [A.R.S. § 12-2101\(B\)](#).

STATEMENT OF FACTS

Appellants complain that Dennis was removed as a beneficiary from his parents' trust, but then claim that “the reasons for this removal are not relevant to this appeal” and, despite the tease, refuse to disclose the reasons. (Opening Brief, p. 12). Indeed, the Opening Brief includes an entire section that relies on Appellants' own characterization of the facts, with no citation to the record, and no support anywhere else in the Opening Brief. (See Opening Brief, pp. 12 - 16). For example, Appellants state, with no citation to the record, that “Evelyn knew *12 that her son had had medical difficulties in the past, but she did not want her son Dennis to be left on the streets.” (Opening Brief, p. 12). Evelyn died in 1995, and there is no evidence in the record as to Evelyn's purported “knowledge.” Nor is there any citation to support the statement that in June, 1997, “Victor was contemplating doing something for Dennis...” (*Id.*). Given Appellants' unsupported characterizations, it is appropriate that information be provided regarding certain background matters raised by the Opening Brief. The material background and other relevant facts are as follows:

A. Dennis

Dennis's own trial testimony establishes the factual background for Appellants' vague statement that, in November, 1993, Victor and Evelyn Friedman removed their son Dennis as a beneficiary of their trust. (Opening Brief, p. 12). In December, 1983, Victor and Evelyn conveyed a 19.6% interest each to Dennis and Jo Ann in a Tempe property known as University Square. (April 9, 2007 Transcript (4/9/07 Tr.), p. 36). At the time of the gift, Dennis's interest was valued at approximately \$300,000.00. (*Id.*, p. 38). Dennis received an additional gift from his parents in January, 1984, raising the total gift value to \$400,000.00 in January 1984. (*Id.*, p. 39). By April, 1985, Dennis sought to sell back to his parents a portion of his interest, to pay off debts related to what he describes as “a manic episode that I had gambling.” (*Id.*, p. 41). At the end of 1986, Victor and *13 Evelyn agreed to buy out Dennis's gifted partnership interest for \$700,000.00. (*Id.*, p. 45). Since that time, Dennis has never worked, in his words, “in a regular structured full-time job.” (*Id.*, p. 46). He has earned no money from employment, and was unable to state at trial how much he has earned in any given year from investment interest or dividends. (*Id.*).

By 1993, Dennis had “pretty much” exhausted the money from the 1986 buyout: “I would say that a healthy good portion of it was gone.” Dennis's parents agreed to pay him \$3,000.00/month, and did so for the next ten years, until his father's death. (*Id.*, p. 47).

B. Victor - Before June, 1997

Victor was an electrical contractor in Illinois and a successful independent businessman and investor in Arizona. (T.E. 46, p. 11). Victor and Evelyn created the Trust in 1977 and amended and restated it in 1993. All trust and estate planning documents were drafted by their attorney Les Plattner or by other attorneys in Plattner's firm. Their professional relationship began in the mid-1970's and lasted until the respective deaths of Evelyn and Victor. Victor managed his business and personal affairs until June, 1997, when he became ill. (*Id.*, pp. 13 - 14; see also 4/9/07 Tr., p. 132 - 133).

***14** *D. Evidence Relating to Victor's Testamentary Capacity*

1. No Changes to the Original Trust Agreement from 1993 to 1997

The Original Trust Agreement leaves virtually all of Evelyn and Victor's assets to Jo Ann. (4/9/07 Tr., p. 135). Although Plattner discussed making some provision for Dennis, Evelyn and Victor consistently refused to sign any documents that would create such a provision for Dennis, “saying that they didn't want to leave anything to Dennis at all.” (*Id.*). There was no change in the Original Trust Agreement after 1993 and prior to Evelyn's death, and the Original Trust Agreement represented Victor and Evelyn's joint estate plan. (*Id.*, p. 137). After Evelyn's death in 1995, Plattner continued to urge Victor to make provisions for Dennis. In October, 1996, Plattner's office prepared a draft charitable remainder trust and sent it to Victor, but it was never signed. In March, 1997, Plattner sent Victor a letter reminding him about the document and asking if he wanted to proceed with it. Again, Victor did not respond. (4/9/07 Tr., pp. 145 148).

2. Encephalitis, June, 1997

On June 17, 1997, Victor developed herpes encephalitis and became comatose. He was admitted to St. Luke's Hospital and later to St. Luke's Hospital Rehabilitation. He was left with severely impaired short term memory and other neurologic deficits. (T.E. 53, p. 2).

***15** *3. Changes to Original Trust Agreement After the Brain Injury*

In April, 1998, Plattner met with Victor at his home to review his estate plan. Plattner drafted a memorandum to reflect his impressions of the meeting. (4/9/07 Tr., p. 156; T.E. 13). Both the memo and Plattner's trial testimony reflect Plattner's concerns about Victor's short term memory. (*Id.*; 4/9/07 Tr., p. 158). Victor's long term memory appeared intact when, consistent with his and Evelyn's prior statements and with the Original Trust Agreement, Victor was adamant to Plattner that he did not want to leave anything to Dennis. Plattner noted:

He understands the residue of the assets which he owns, which are in the nature of several million dollars will all go to Jo Ann. They will not go to Dennis, notwithstanding the fact that several times I tried to engage him to consider the possibility of giving something to Dennis. He said over and over again that he does not believe Dennis is entitled to share in the inheritance. If Jo Ann wishes to provide him with something from time to time after his death (Vic's death), that it would be strictly up to her without any obligation on her part. (T.E. 13; see also 4/9/07 Tr., p. 157)

Notwithstanding the foregoing, Plattner continued his efforts to urge Victor to leave something for Dennis. Less than a month later, in May, 1998, one of Plattner's partners prepared the 1998 Amendment that created the CRUT. (*Id.*, p. 158). Plattner has no memory of how his office ended up preparing such a document, given Victor's prior statements, and no memory of the execution of this document. (4/9/07 Tr., pp. 161-162). Plattner acknowledged that Victor signed ***16** the 1998 Amendment

“reluctantly,” saying that “[h]e wasn't exuberant about it but recognized it was the appropriate thing to do.” (4/9/07 Tr., p. 177). Plattner testified that, on the one hand, he has no specific memory of Victor signing the 1998 Amendment, but on the other hand, he was “reasonably comfortable” that Victor understood what he was signing. (4/9/07 Tr., p. 162).

The 2001 Amendment was also prepared by “someone else” in Mr. Plattner's office. (*Id.*, p. 163). Plattner has no independent recollection of the signing of the document or how the Libby Bequest was added. (*Id.*, pp. 166-167). Although in deposition testimony Plattner testified that “Victor understood what he was signing,” at the time of the trial Plattner could not even remember being present at the signing. Again, his testimony was inconsistent: on the one hand, Plattner could not remember Victor's demeanor and had no personal recollection of having been present, but on the other hand, he testified that he asked questions about his children and their relationships. Plattner testified that when asked who he wanted to provide for, “[Victor] would say ‘Jo Ann. Just Jo Ann.’ ” (*Id.*, pp. 168-170). Plattner acknowledged that, while he kept asking Victor the same questions to be sure he understood, he never tested Victor for an incorrect answer to truly test his understanding. (*Id.*, p. 169).

***17** 4. Dr. Pamela Willson, Clinical Neuropsychologist

An MRI in late June, 1997 showed extensive structural damage in Victor's temporal lobe and extending deeper into the brain and toward the frontal lobes. (See 4/10/07 Tr., pp. 5, 16). As Dr. Willson testified, the damage included permanent destruction of brain tissue and destruction of Victor's major memory pathways. (*Id.*). The MRI showed extensive hemorrhaging and destruction of the hippocampus, the specific area of the temporal lobe that is the primary gateway for new information. The hippocampus controls reasoning, problem solving, verbal cognition, and the ability to accurately retrieve and connect memories; that area of Victor's brain “was devastated.” (*Id.*, p. 17).

On May 15, 2001, Dr. Willson administered to Victor a “short portable mental status questionnaire” - a standard screening test used internationally to identify cognitive problems. (*Id.*, pp. 18-19). Based upon the questionnaire, Dr. Willson determined that Victor suffered “severe impairment.” He did not know his age, the date, the year, or where he was. On tests of language comprehension, Victor scored in the range of someone with a clinical language impairment. (*Id.*, pp. 20-21).

On May 30, 2001, Dr. Willson wrote that Victor was “not able to make informed independent financial or business decisions” and that he “can't make independent, informed, reasonable decisions about his welfare.” (T.E. 15). ***18** Testifying regarding that letter, Dr. Willson reiterated that “in my opinion, he was not capable of making informed decisions.” (4/10/07 Tr., p. 26). Dr. Willson further testified that there was no reason to believe that Victor's ability to make decisions was any different between June, 1997 and May, 2001. (*Id.*, p. 27). If anything, by May, 2001, Victor's capacity might have been worse. (*Id.*, p. 51).

Dr. Willson also wrote that, in May, 2001, Victor “may have testamentary capacity in the broad sense, but that could be a close call.” (T.E. 15). With respect to that statement, Dr. Willson testified that Victor's “memory was so severely impaired that, according to my personal clinical standards, he would not meet testamentary capacity criteria because he would have to depend on someone else to tell him all the details of his estate and the estate plan, and what changes he was talking about making or someone was talking about making.” (4/10/07 Tr., p. 32). When Dr. Willson met with Victor in May, 2001, he could not remember all of his family without prompting, forgetting, for example, his son Dennis and his sister Libby. (*Id.*, p. 35).

Moreover, Victor's vision was so poor that he could only read extremely large print. Because of his severe short term memory problems, if he read a large document, by the time he was on paragraph two, “he would no longer remember the contents of paragraph one.” (*Id.*, p. 36).

***19** Dr. Willson testified that, notwithstanding the foregoing, Jo Ann believed that her father had testamentary capacity, and Plattner believed that his client had testamentary capacity: “It happens all the time with people ... bankers and attorneys... friends and family... they cover for the person, they fill in the gaps, and they really have no awareness how much they are doing the prompting or the structuring.” Dr. Willson testified that “[i]t comes out of affection. But because you don't want to think that your dad is, someone you've always looked up to, is really that severely incapacitated.” (*Id.*, pp. 51-52).

5. *Dr. John Michael Powers, Neurologist*

Dr. Powers graduated medical school in 1971; he completed a three year neurology residency, and was the head of neurology at Fort Leonard Farney Hospital for the U.S. Army. (*Id.*, pp. 103 - 104).

Dr. Powers first evaluated Victor at St. Joseph's Hospital on June 26, 1997. (*Id.*, p. 105). He concluded that as a result of encephalitis, Victor suffered significant permanent injury, the most prominent being "profound memory impairment, so-called amnesic syndrome." Victor suffered damage to both sides of the temporal lobe, in the hippocampus, which caused him to lose his ability to record new memory. (*Id.*, p. 107). Sometimes there may be partial recovery of function, but in Victor's case, "unfortunately, things didn't get substantially better, so it was evident that the hippocampus areas on both sides of his brain, both *20 temporal lobes, were severely damaged, simply meaning the brain cells there had died." (*Id.*, p. 108). Dr. Powers thereafter treated Victor from October 1, 1997 to November 25, 2002, and during that time period noticed only minimal improvement; his memory impairment "remained profound." Victor had no idea of the date, the month, or what holiday was coming up; when told the holiday involved turkey he said Thanksgiving and November, but a minute later could not remember the conversation. (*Id.*, pp. 109 - 110).

Dr. Powers testified that, notwithstanding the foregoing, Victor could have engaged in a conversation and appeared as if he understood. (*Id.*, p. 112). Dr. Powers noted that family members often over-interpret the patient's understanding: "I suspect Mr. Plattner was somehow intuiting that Mr. Friedman understood it without actually testing him in that regard." (*Id.*, p. 118).

6. *Dr. Manuel H. Tafur, Psychiatrist*

Dr. Tafur has been in practice since 1976; he is currently medical director of the general psychiatric program at St. Luke's Medical Center. (*Id.*, pp. 149 - 150). Dr. Tafur treated Victor from October 22, 1997 to May, 2001. He determined that Victor suffered significant damages to his brain, particularly the frontal lobes, on the left side, and as a consequence, developed significant cognitive problems. Victor had serious memory difficulties, and would forget things "from one minute to the next." On a test for dementia, where a normal score is 30 and below 15 is *21 considered severely demented, Victor scored 13 and 16 on two different occasions. (*Id.*, pp. 150- 152).

Dr. Tafur testified that, after Victor was sick, if he had been presented with the Original Trust Agreement, he might understand an explanation for the moment, but would probably not have any ability to remember why he had written it, and if told by someone he trusted, might briefly understand, but would forget shortly thereafter. (*Id.*, p. 155). With respect to the 1998 Amendment, Dr. Tafur testified that it's possible he would have understood what it was, but "would not remember what he had understood." (*Id.*, p. 156).

Dr. Tafur noticed no improvement in Victor's cognitive ability between 1997 and May, 2001. (*Id.*, p. 158).

There was no other medical evidence of Victor's mental capacity presented at trial, and no contrary evidence regarding testamentary capacity. Dennis expressly testified that he has "no evidence one way or the other" whether his father had testamentary capacity at the time he signed the 2001 Amendment. With respect to whether the 2001 Amendment reflects his father's testamentary wishes, Dennis testified that he has "no opinion on it one way or the other." (4/9/07 Tr., p. 54). When asked what evidence he has that the 1998 Amendment is valid, Dennis testified that he has "seen no evidence to the contrary." (*Id.*, p. 51).

*22 7. *Jo Ann Friedman Burgess, Victor's Daughter*

When her father died on March 4, 2003, Jo Ann understood that the entire estate plan, including the Amendments, was valid. (4/11/07 Tr., p. 52). In a meeting with Dr. Willson in September, 2005, Jo Ann learned, for the first time, that Victor did not

have testamentary capacity after his brain injury. (*Id.*, pp. 71-72). Jo Ann testified that after Dr. Willson fully explained the devastation to Victor's brain and that his brain had been destroyed, she stepped outside and said, "Oh my God, I might have been wrong." (*Id.*, p. 73).

ISSUES PRESENTED FOR REVIEW

1. Whether the elements of judicial estoppel are present and, if so, whether the Trial Court properly exercised its discretion in refusing to apply the doctrine.
2. Whether the Trial Court properly exercised its discretion in refusing to apply the doctrine of laches.
3. Whether a statute of limitations is applicable at all under these circumstances and, if so, whether the Trial Court properly determined that it had not expired.
4. Whether evidence exists to support the Trial Court's determination, as the fact-finder, that Victor Friedman lacked testamentary capacity when he executed the 1998 Amendment and the 2001 Amendment.

*23 ARGUMENT

I. STANDARD OF REVIEW

As a threshold matter, Dennis and Libby rely on the wrong standard of review on at least three of the four issues presented. (Opening Brief, p. 11). The Supreme Court has made clear that testamentary capacity is a question of fact, and that the fact-finder's determination will not be overturned unless it was clearly erroneous. *In re Thomas' Estate*, 105 Ariz. 186, 189, 461 P.2d 484, 487 (1969). This issue requires an examination of the testimony at trial; for Appellants to prevail, it must appear that the Trial Court, sitting as the trier of fact, was clearly erroneous in finding that Victor lacked testamentary capacity on the dates he executed the Amendments. *Id.* at 189, 461 P.2d at 487.

The Arizona Supreme Court makes clear that judicial estoppel is an equitable concept, "and its application is therefore within the court's discretion." *State v. Brown*, 212 Ariz. 225, 228, 129 P.3d 947, 950 (2006). Unless this Court finds both that the elements of a claim for judicial estoppel appear from the record of this case, and that the Trial Court abused its discretion in failing to apply the doctrine, the Judgment is properly affirmed as to this issue.

This Court has recently reiterated the rule that a claim of laches is reviewed for abuse of discretion. *Flying Diamond Airpark, LLC v. Meienberg*, 156 P.3d 1149, 1155 (App. 2007).

*24 Determination of a claim's accrual date for a statute of limitations period usually is a question of fact; this Division has made clear that it will not resolve statute of limitations issues based upon disputed facts, although questions of law are reviewed *de novo*. *Premium Cigars Intern., Ltd. v. Farmer-Butler-Leavitt Ins. Agency*, 208 Ariz. 557, 570, 96 P.3d 555, 568 (App. 2004). In any event, because there is no claim asserted upon which a statute of limitations might accrue, this issue is, as set forth in detail below, a red herring.

II. THE TRIAL COURT PROPERLY EXERCISED ITS DISCRETION IN REFUSING TO APPLY THE DOCTRINE OF JUDICIAL ESTOPPEL

Dennis and Libby argue that, because Jo Ann made intermittent statements acknowledging, or failing to challenge, the Amendments, she was thereafter estopped to seek an evidentiary hearing on Dennis's own Petition to Determine Validity. (Opening Brief, pp. 17 - 25). The estoppel argument is disingenuous the record shows both that Victor's mental capacity was

always at issue and that there was never any prior judicial determination as to his testamentary capacity with respect to the Amendments.

Judicial estoppel is a doctrine that protects the integrity of the judicial system by “prevent[ing] a party from taking an inconsistent position in successive or separate actions.” *State v. Towery*, 186 Ariz. 168, 182, 920 P.2d 290, 304 (1996). For judicial estoppel to apply, three requirements must be met: (1) the *25 parties must be the same, (2) the question involved must be the same, and (3) the party asserting the inconsistent position must have been successful in the prior judicial proceeding. *Bank of America Nat. Trust and Sav. Ass'n v. Maricopa County*, 196 Ariz. 173, 175, 993 P.2d 1137, 1139 (App. 1999). For reasons explained below, the second and third elements cannot be met in this case.

A. Jo Ann Never Took a Contrary Position on the Same Question - Whether Victor had Testamentary Capacity to Execute the Amendments

Jo Ann has consistently argued that Victor's incapacity (including his testamentary capacity) was an issue for trial. Dennis and Libby, on the other hand, consistently sought to avoid an evidentiary hearing on Victor's incapacity and took inconsistent positions throughout the proceedings. As trustee, Jo Ann was obligated to seek a judicial determination to resolve the issue and the inconsistencies.

Dennis and Libby first raised the issue of Victor's capacity when they filed Guardianship Proceedings in May, 2001, just two months after Victor executed the 2001 Amendment. After Victor's death, in pleadings filed in April, 2004, Dennis and Libby alleged that since June, 1997 Victor was an incapacitated and vulnerable adult. In her 2004 Petition for Instructions, Jo Ann pointed out that the incapacity issue had been raised by Dennis and Libby and was properly resolved only by evidentiary hearing and court order. It was not until November, 2005, after Special *26 Administrator Marlene Appel had submitted her report finding both that Victor had been a vulnerable adult and that there was no basis for an exploitation claim against Jo Ann, and after the Court dismissed the breach of trust claims, that Dennis and Libby withdraw their claims questioning Victor's capacity in order to avoid a hearing on the Petition for Instructions.

The record thus shows that Dennis and Libby used incapacity as both a sword and a shield. When the incapacity allegations failed to work to their advantage, Dennis and Libby withdrew them and sought to prevent the issue of incapacity from being used to their disadvantage.

As far back as July, 2004, when she filed the Petition for Instructions, Jo Ann expressly sought “instruction as to the validity of each of the Amendments.” (CR 67). Again in November, 2006, Jo Ann, in her individual capacity, responded to Dennis's Petition to Determine Validity, asserting that the court could conclude from the evidence that the Trust Amendments may be invalid because (a) Victor lacked testamentary capacity or (b) Victor was subject to sufficient encouragement or influence exerted upon him by his estate planning counsel and Jo Ann that the Amendments do not reflect Victor's testamentary intent. (CR 170).

Jo Ann's uncertainty or lack of medical knowledge with respect to her father's mental capacity is insufficient, in this context, to constitute a legally inconsistent position and thereby invoke the doctrine of judicial estoppel. Jo Ann, *27 as Trustee, asked the Court for instructions as to the validity of the Amendments because Jo Ann's personal belief as to her father's capacity was never dispositive of the issue.

Dennis and Libby criticize Jo Ann for relying on a Medical Power of Attorney executed while Victor was in the hospital, while questioning Victor's capacity in executing the Amendments months later. (Opening Brief, p. 19). But the evidence at Trial showed that doctors at the hospital asked Jo Ann to leave the room, and privately met with Victor while he signed the Medical Power of Attorney. Jo Ann testified that, at that point, she had no reason to believe that the document might be invalid: “I thought that if the doctors thought he was capable that he was capable.” (9/11/07 Tr., pp. 29 - 31).

Similarly, at the time the Amendments were executed in 1998 and 2001, Jo Ann, as a lay person and a loving daughter, believed (or wanted to believe) that her father understood what he was signing. At the time of Victor's death in March, 2003, Jo Ann understood that his estate plan consisted of the Original Trust Agreement, the 1998 Amendment and the 2001 Amendment, and she believed that those documents were valid. (*Id.*, p. 52). In a meeting with Dr. Willson in September, 2005, Jo Ann told the doctor she believed her father had capacity, and was surprised to learn, for the first time, that Dr. Willson did not agree with her, and that Victor did not have testamentary capacity. (*Id.*, pp. 71 - 72). Jo Ann *28 testified that Dr. Willson explained fully the devastation to Victor's brain, and that his brain had been not just damaged, but destroyed. With respect to the validity of the Amendments, Jo Ann testified that, after the meeting, she stepped outside and said, "Oh my God, I might have been wrong." (*Id.*, p. 73). Medical testimony at trial described how and why Jo Ann was mistaken and explained her difficulty in understanding and accepting that Victor might not have had capacity. (9/10/07 Tr., pp. 51 -52, 112- 118).

Dennis and Libby also argue that Jo Ann denied their request to admit that Victor was impaired and that Victor's capacity was therefore "conclusively established and admitted" under Rule 36(c), Ariz.R.Civ.P. (Opening Brief, p. 18). Because there is no citation to the record (*Id.*), and the purported First Request for Admission does not appear to be included in the record on appeal, this Court must assume that it, and any other testimony or evidence not included in the record on appeal, supports the action taken by the Trial Court. *State ex rel. Baumert v. Superior Court for Maricopa County*, 118 Ariz. 259, 260-261, 576 P.2d 118, 119 - 120 (1978). In any event, Dennis and Libby's argument misstates the Rule and misstates the effect of any denial of a request for admission.

Rule 36(c) provides in part that "[a]ny matter admitted under this rule is conclusively established..." Even assuming the accuracy of Dennis and Libby's statement of a document not in the record, Jo Ann made no admission - she simply *29 denied Dennis and Libby's overly broad statement that Victor "was impaired or lacked sufficient understanding or capacity to make or communicate informed decisions concerning his person." Jo Ann's denial neither conclusively established Victor's capacity, nor precluded her from seeking a judicial determination of testamentary capacity.

Similarly, Jo Ann's Motion for Summary Judgment Regarding the Dennis Friedman Irrevocable Trust fails to provide a legal basis to preclude an evidentiary hearing on testamentary capacity. (Opening Brief, p. 20). In their original Petition, Dennis and Libby attempted to establish a non-existent "Dennis Friedman Irrevocable Trust." (CR 1). The Motion was filed by Jo Ann as Trustee, in January, 2004, before she met with Dr. Willson and discovered medical evidence as to Victor's testamentary capacity. (CR 27). More importantly, the purpose of the Motion was not to establish testamentary capacity under the standard set forth in *Killen*, 188 Ariz. at 565, 937 P.2d at 1371, but to interpret the trust documents. The Motion conclusively established that the purported irrevocable trust was never created or funded and was not part of the Friedmans' estate plan. (CR 27, p. 1; see also CR 60). Moreover, the Motion was filed prior to Jo Ann as Trustee filing the Petition for Instructions and more than three years prior to the court ruling that ultimately invalidated the Amendments.

***30 B. Jo Ann was Never "Successful" on the Same Issue - That is, the Trial Court Never Previously Determined Whether Victor had Testamentary Capacity to Execute the Amendments**

This Division has made clear that judicial estoppel should be invoked cautiously. *Bank of America*, 196 Ariz. at 175, 993 P.2d at 1139. If a court has not accepted a party's position or assertion, "there is no risk of inconsistent results." *Id.* at 176, 993 P.2d at 1140. For purposes of judicial estoppel, a party is not considered to have been successful in a prior judicial proceeding unless (a) the court in that proceeding granted the party relief or accepted the party's earlier inconsistent position either as a preliminary matter or as part of a final disposition, and (b) the party's inconsistent position was a significant factor in the relief granted. *Id.* at 175-176, 993 P.2d at 1139 - 1140.

Even assuming *arguendo* that Jo Ann took an earlier inconsistent position that her father did have testamentary capacity in executing the Amendments, Dennis and Libby must show both that the Trial Court accepted the earlier inconsistent position, and that it was a significant factor in the Court's decision. They have not made this showing.

Dennis and Libby argue that the Special Administrator relied on the parties' stipulation that Victor had capacity to execute all documents, and that the Special Administrator's report helped Jo Ann avoid a vulnerable adult claim. (Opening Brief, p. 21). But Appel's report made clear that Victor's capacity was "not *31 relevant" to her findings, and expressly acknowledged that the issue was left for later determination. (T.E. 46, p. 21, fn 1). Moreover, a violation of [A.R.S. §46-456](#) requires a finding that the allegedly exploited person was *either* incapacitated or vulnerable. The Special Administrator determined that Victor was vulnerable and, therefore, fell under the protection of the statute. Any stipulations regarding Victor's capacity to sign documents had no impact on the Special Administrator's determination that there was no exploitation.

Dennis and Libby cite no ruling that would constitute the sort of "success" necessary to trigger judicial estoppel. Jo Ann was not the plaintiff in this case -- she was the defendant who consistently asked that the validity of the Amendments be determined after an evidentiary hearing. Her factual assertions, if any, regarding Victor's capacity, were never the basis for a determination of testamentary capacity under the *Killen* standard. The Trial Court had no occasion to accept or even to entertain Jo Ann's assertions of capacity or incapacity until the evidentiary hearing on that precise issue; thus, there was no threat of inconsistent results. Given that Dennis and Libby raised the issue in their Petition, and that Jo Ann, as Trustee, and as a fiduciary, properly sought a judicial determination, Jo Ann was not judicially estopped from putting forth truthful medical evidence.

***32 C. In any Event, the Trial Court Properly Exercised its Discretion in Refusing to Apply the Doctrine of Judicial Estoppel**

Based upon the record before the Trial Court, including the continuing, if inconclusive, allegations of incapacity, it was reasonable and fully within the discretion of the Trial Court to hold an evidentiary hearing to resolve Dennis's Petition to Determine Validity. Accordingly, even if the elements of judicial estoppel otherwise appear from the record, the Trial Court properly exercised its discretion in permitting the hearing to go forward.

III. THE STATUTE OF LIMITATIONS ARGUMENT IS INAPPLICABLE

The statute of limitations argument fails for at least two reasons: (1) the four year statute of limitations under [A.R.S. §12-550](#) is inapplicable and a red herring; and (2) even if it is applicable, the four year period did not begin to accrue at least until Victor died in March 2003, making any claim of incapacity in this case fully within the limitations period.

Generally, the statute-of-limitations period begins to run and the cause of action accrues when one party may sue another. [Gust, Rosenfeld & Henderson v. Prudential Ins. Co. of Am.](#), 182 Ariz. 586, 588, 898 P.2d 964, 966 (1995). "The traditional construction of that rule has been that the period of limitations begins to run when the act upon which legal action is based took place, even though the plaintiff may be unaware of the facts underlying his or her claim." *33 [Premium Cigars Intern., Ltd.](#), 208 Ariz. 557, 571, 96 P.3d 555, 569 (App. 2004). Statutes limiting the time for bringing certain causes of action relate to civil actions between private parties, and these rules are often meaningless in the context of trust proceedings.

Applicable trust law provides that the court has exclusive jurisdiction of proceedings initiated by interested parties concerning the internal affairs of trusts:

Proceedings which may be maintained under this section are those concerning the administration and distribution of trusts, the declaration of rights and the determination of other matters involving trustees and beneficiaries of trusts. These include, but are not limited to, proceedings to:

3. Ascertain beneficiaries, determine any question arising in the administration or distribution of any trust including questions of construction of trust instruments, instruct trustees and determine the existence or nonexistence of any immunity, power, privilege, duty or right.

[A.R.S. §14-7201\(A\)](#). By this provision, it is clear that a trustee or trust beneficiary may seek instruction from the court over such matters as the validity of a trust document and the identity of the ultimate beneficiaries. Arizona follows the common law in the field of trusts. *Olivas v. Board of Nat. Missions of Presbyterian Church, U. S. of America*, 1 Ariz.App. 543, 405 P.2d 481 (App. 1965). Accordingly, further guidance is provided in §259, Restatement (Second) of Trusts (1959), as follows: “the trustee is entitled to apply to the court for *34 instructions as to the administration of the trust if there is a reasonable doubt as to his duties or powers as trustee.” With respect to the time for seeking such instruction, Comment c provides:

The court will not instruct the trustee as to questions which may never arise or may arise in the future but which have not yet arisen.

Each of the Amendments affected the distribution of Trust assets only after Victor's death. Therefore, prior to his death in March, 2003, Jo Ann had no right or reason to raise any questions regarding the validity of the Amendments. Both before and after his death, Dennis and Libby repeatedly questioned Victor's capacity. When efforts to work out distribution of Trust assets failed, and after Dennis and Libby filed suit against her alleging Victor's incapacity, Jo Ann filed her Petition for Instructions in June, 2004, barely a year after Victor's death. The Petition for Instructions was dismissed, but only after Dennis and Libby withdrew all of their allegations of incapacity and only without prejudice to allow the issue of the validity of the Amendments to be raised again if circumstances so warranted. After fighting so long to avoid an adjudication on the validity of the Amendments, Dennis himself ultimately filed the Petition that resulted in the evidentiary hearing on Victor's testamentary capacity. (CR 161).

Dennis and Libby argue that Jo Ann asserted the invalidity of the Amendments “for the first time” in November, 2006. Even if this is accurate, and *35 even if the four year limitation period applies, the assertion of invalidity was fully within the four year period.

In any event, the appropriate interpretation is that Jo Ann, as Trustee, filed the Petition for Instructions seeking an instruction as to Victor's testamentary capacity and the validity of the Amendments at the time at which the issue arose and the issue was therefore properly and timely raised under applicable trust law. [A.R.S. §14-7201\(A\)](#).

IV. THE TRIAL COURT PROPERLY EXERCISED ITS DISCRETION WITH RESPECT TO THE DOCTRINE OF LACHES

Dennis and Libby again mischaracterize Jo Ann's position as an affirmative claim that might be subject to a defense such as laches. (Opening Brief, p. 26). The argument makes no sense in this context. It is another red herring.

Laches is an equitable defense to a claim, designed to discourage dilatory conduct. *Sotomayor v. Burns*, 199 Ariz. 81, 83, 13 P.3d 1198, 1200 (2000). The defense may be raised to bar a claim when the delay is unreasonable and results in prejudice to the opposing party. *Id.* But Dennis and Libby have not shown (1) that there is a “claim;” (2) unreasonable delay; or (3) prejudice.

With respect to the assertion of unreasonable delay, Dennis and Libby complain that Victor “is no longer present and cannot be examined” regarding execution of the Amendments or intent. (Opening Brief, p. 27). But this is true when examining the validity of any testamentary instruments. See for example, *36 *Killen*, 188 Ariz. 562, 937 P.2d 1368 (testator executed will in February, 1988, and dispute over her testamentary capacity began after she died in March, 1993); *In re Weil's Estate*, 21 Ariz.App. 278, 518 P.2d 995 (App. 1974) (testator executed will in July, 1969 and codicil in May, 1970; her testamentary capacity on the dates of execution was examined after she died shortly thereafter).

Dennis and Libby complain further that the litigation since Victor's death was “all based on the presumption that the 1998 and 2001 Amendments were valid,” and that if the Amendments were not valid “three years of litigation could have been avoided.” (Opening Brief, p. 27). But these statements ignore that Jo Ann filed the Petition for Instructions in June, 2004,

specifically raising the questions about the validity of the Amendments. (CR 67). Jo Ann began asking the Court to determine the validity of the Trust Amendments more than two years before Dennis asked for the same relief. Dennis and Libby vehemently sought to avoid any such adjudication.

Dennis and Libby claim that “several of the Court's prior rulings depended on the validity of the Amendments,” and that if the validity of the Amendments were “brought before the Court on a timely basis, much court time and legal fees could have been saved.” (Opening Brief, pp. 27 - 28). But again, Jo Ann filed her Petition for Instructions in June, 2004, long before much of the litigation and the “rulings” to which Dennis and Libby refer. At the end of the litigation, Dennis and *37 Libby withdrew all their allegations of incapacity to induce Jo Ann to dismiss the Petition for Instructions in November, 2005. Dennis and Libby demanded that dismissal be with prejudice. When the Court ruled that the Petition for Instructions be dismissed without prejudice, Dennis and Libby could have asked that it be heard and resolved at that time, but they chose not to do so, and cannot now be heard to complain that they have been prejudiced by the delay in resolving the issue.

V. THE TRIAL COURT'S FINDING OF LACK OF TESTAMENTARY CAPACITY IS SUPPORTED BY THE EVIDENCE

As a threshold matter, there is no dispute that the Trial Court applied the correct legal standard for determining testamentary capacity. (See Opening Brief, p. 28). The law presumes that a testator had the requisite mental capacity to execute a will, and the contestant has the burden of showing by a preponderance of the evidence that the testator lacked testamentary capacity at the time the will was executed. *Matter of Estate of Thorpe*, 152 Ariz. 341, 343, 732 P.2d 571, 573 (App.1986). As the Trial Court accurately stated, to invalidate a will for lack of testamentary capacity, the contestant must show that the testator lacked at least one of the following elements: (1) the ability to know the nature and extent of his property; (2) the ability to know his relation to the persons who are the natural objects of his bounty and whose interests are affected by the terms of the *38 instrument; or (3) the ability to understand the nature of the testamentary act. *Killen*, 188 Ariz. at 565, 937 P.2d at 1371.

The Opening Brief cites *Evans v. Liston*, 116 Ariz. 218, 568 P.2d 1116 (App. 1977),⁵ for the proposition that the effects of senility or old age do not show lack of testamentary capacity. While that is a correct statement of the law, it is distinctly inapplicable to this case. The evidence presented in this case showed not simply senility or age but a specific, catastrophic event that permanently damaged Victor's brain. The physical damage to Victor's brain and the resulting devastating memory loss made it simply impossible for Victor to comprehend the 1998 and 2001 Amendments. These Amendments were wholly inconsistent with Victor's expressed intent not to provide Dennis with anything more than he had already received from his parents.⁶

Dennis and Libby cherry-pick the testimony they choose to present on appeal (Opening Brief, Ex. B - I), and draw certain inferences based upon that testimony (*Id.*, pp. 30 - 34). As set forth in detail above, there is a plethora of medical evidence that Victor suffered permanent brain damage that rendered him *39 unable to retain new information for more than a moment, and no medical evidence to the contrary. In any event, even assuming that the inferences drawn by Appellants might support a contrary conclusion, the Supreme Court has made clear that the only question on appeal is whether there is evidence to support the trial court's finding as to testamentary capacity. *Thomas' Estate*, 105 Ariz. at 189, 461 P.2d at 487. In that regard, the following evidence supports the Trial Court's conclusions in this case:

1. *Dr. Pamela Willson*, the neuropsychologist retained by Les Plattner in the 2001 Guardianship Proceedings testified to Victor's extensive and permanent structural brain damage. (*Id.*, p. 16). When she evaluated Victor in 2001, she found him to be severely disoriented - he did not know his age, the date, the year or specifically where he was in terms of specific details. (*Id.*, p. 21). Victor could not remember all of his family without prompts, forgetting his son and, at times, his sister. (*Id.*, p. 35). His vision was significantly impaired so he could only read very large print and, if the document were of any length he would not have comprehended it. “By the time he was on paragraph two, he would no longer remember the contents of paragraph one.” (*Id.*, p. 36). Dr. Willson believed Victor's “memory was so severely impaired that, according to my personal clinical standards, he would not meet testamentary capacity criteria because he would have to depend on someone else to tell him all the changes he

was talking about making, *40 or someone was talking about making. He couldn't remember that.” (*Id.*, p. 32). Dr. Willson testified Victor would not have been capable of understanding the 1998 Amendment nor would he have been able to articulate a desire to create a gift like that for Dennis without someone cuing him - “giving him the idea, encouraging the idea, persuading him and sticking it in front of his face to sign before he could forget it or change his mind.” (*Id.*, p. 46).

Dr. Willson was clear that, based on what she knew about Victor's condition at the time he signed the 1998 Amendment, he did not have testamentary capacity. (*Id.*, p. 48). She also did not believe Victor had capacity to sign the 2001 Amendment (*Id.*, p. 50).

2. *Victor's neurologist.* Dr. John Michael Powers, confirmed the significant permanent injury to Victor's brain as a result of the viral encephalitis. (*Id.*, p. 107) As a result of this injury, Victor suffered from “a profound memory impairment, so-called amnesic syndrome.” (*Id.*, p. 107). Like Dr. Willson, Dr. Powers confirmed Victor's ability to seem like he understood what was going on around him when, in reality he did not.

And if you asked him questions that tested his understanding, he would try and deflect them by saying yes or dismissing the question. It was only when you pressed him for an answer that it became evident that he didn't understand. So individuals with this sort of problem generally, and Mr. Friedman's in particular, as I recall, would engage in a conversation, and you would be *41 deceived to think that they were understanding and registering and retaining more than they were. But when you really pressed him, you find out that they did not. (4/10/07 Tr., pp. 112-113)

It was the opinion of Dr. Powers that Victor would not have been capable of understanding either the 1998 or 2001 Amendments. (*Id.*, p. 126).

3. *Victor's treating psychiatrist,* Dr. Manuel H. Tafur testified, consistent with Dr. Willson and Dr. Powers, to Victor's significant brain damage and memory loss. Dr. Tafur treated Victor from October, 1997 until May, 2001 and found that Victor “would forget very easily things from one minute to the next. Would not be able to repeat anything.” (*Id.*, p. 151). The brain damage was severe and permanent, such that the damage he had in 1997 was the same as in 2001. (*Id.*, pp. 158-159). Victor scored 13 and 16 on mini-mental exams given by Dr. Tafur. “Below 25 we think that the person is having problems with dementia already, and below 15 is considered to be severely demented.” (*Id.*, p. 152)

4. *Laypersons.* The testimony explains how lay persons such as Jo Ann and Les Plattner could have believed that Victor understood what he was doing with their unconscious prompting and failure to try to elicit incorrect answers to ensure that Victor really knew what he was saying. (4/9/07 Tr., pp. 52, 169; 4/10/07 Tr., pp. 51 - 52).

Dennis and Libby represent that “the only testimony that exists is that Victor had testamentary capacity,” and that Jo Ann “failed to present any evidence of lack *42 of capacity.” (Opening Brief, p. 34). In view of the evidence set forth in this brief, those statements are plainly false. The Court considered all of the testimony and evidence and ruled that Victor did not have testamentary capacity at the time he signed the 1998 and 2001 Amendments. That there may have been some evidence from which different inferences may have been drawn is insufficient to reverse the fact-finder's decision. Testamentary capacity is a question of fact; the fact-finder's determination will not be overturned unless it was clearly erroneous. *Thomas' Estate*, 105 Ariz. at 189, 461 P.2d at 487. Based upon the substantial evidence above, the Trial Court's decision cannot be found clearly erroneous and must, therefore, be affirmed.

VI. LEGAL FEES

Dennis and Libby provided no benefit to the Trust, and are not entitled to an award of fees. *Matter of Estate of Brown*, 137 Ariz. 309, 670 P.2d 414 (App.1983).

CONCLUSION

For the reasons set forth above, it is requested that this Court affirm the Final Judgment in its entirety. It is further requested that this Court grant Jo Ann an award of her attorneys' fees and costs incurred herein pursuant to [Rule 21, Ariz.R.Civ.App.P.](#) and [A.R.S. §§46-455\(H\) and \(O\)](#), and [§§14-1102](#) and [14-1103](#).

Footnotes

- 1 Jo Ann is over 55 years of age.
- 2 The April 10, 2007 Transcript is "4/10/07 Tr." The April 11, 2007 Transcript is "4/11/07 Tr."
- 3 [A.R.S. §46-456](#) provides, in applicable part, that a person who is in a position of trust and confidence to an incapacitated or vulnerable adult shall act for the benefit of that person to the same extent as a trustee, and if such trustee, by intimidation or deception knowingly takes control, title use or management of the vulnerable adult's property with intent to permanently deprive the person of the property, he is liable to damages, as set forth therein.
- 4 On October 15, 2006, Dennis appealed from the Final Judgment two minor issues relating to the assessment of fees and the interest award on Libby's Bequest (CR 168) (1 CA-CV 06-0723)(the "First Appeal"). That appeal is currently pending before this Court.
- 5 The citation in the Opening Brief, at the top of page 29, suggests that *Liston* is a Supreme Court case, when it is actually a case from this Division.
- 6 Dennis testified to the approximately \$1 million he had already received from his parents in the form of the \$700,000 "buyout" of the gifted partnership interest (4/9/07 Tr., pp. 34, 45), money he used in part to pay gambling debts (4/9/07 Tr., p. 41) and the \$3,000.00 monthly stipends he received from them from 1993 until Victor's death in 2003 (\$36,000 per year for 10 years) (4/9/07 Tr., p. 47).

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